

STATE OF ALASKA

IBLA 96-37

Decided August 23, 1999

Appeal from a decision of the Anchorage District Office, Bureau of Land Management, notifying the State of Alaska that various public easements on lands conveyed to a Native corporation were being terminated.

Motion to Dismiss granted in part, denied in part.

1. Alaska: Navigable Waters--Alaska Native Claims Settlement Act: Navigable Waters--Navigable Waters--Submerged Lands--Submerged Lands Act: Generally

A body of water is navigable in fact when it is used, or is susceptible of being used, as a highway for commerce over which trade or travel are or may be conducted in the customary modes of trade and travel on water. The beds beneath navigable waterbodies vest in a State upon its admission into the Union as an incidence of sovereignty, unless such lands have been previously disposed of or reserved by Congress. There is, however, a strong presumption against pre-Statehood disposals and, where a reservation is involved, there must be a showing both that Congress intended to reserve the bed of a navigable waterbody and that it intended to defeat the State's title thereto.

2. Alaska National Interest Lands Conservation Act: Generally--Alaska Native Claims Settlement Act: Appeals: Standing--Alaska Native Claims Settlement Act: Navigable Waters--Board of Land Appeals--Rules of Practice: Appeals: Standing to Appeal

Under section 901(b) of ANILCA, as amended, 43 U.S.C. § 1631(c) (1994), determinations by the Bureau of Land Management as to whether or not a waterbody is navigable, in the context of selections under ANCSA or ANILCA, are not subject to review by the Board of Land Appeals, unless an appeal was filed prior to Dec. 2, 1980.

3. Alaska National Interest Lands Conservation Act:  
Generally--Alaska Native Claims Settlement Act:  
Appeals: Standing--Alaska Native Claims Settlement  
Act: Navigable Waters--Board of Land Appeals--Rules  
of Practice: Appeals: Standing to Appeal

Where a decision to issue a conveyance to a Native corporation expressly found that a body of water was not navigable and this decision was not appealed prior to Dec. 2, 1980, the finding of nonnavigability is final for the Department and it precludes the State of Alaska from premising standing under 43 C.F.R. § 4.410(b) on an assertion that the State owns the bed of the waterbody because it was, in fact, navigable.

4. Alaska National Interest Lands Conservation Act:  
Generally--Alaska Native Claims Settlement Act:  
Appeals: Standing--Alaska Native Claims Settlement  
Act: Navigable Waters--Board of Land Appeals--Rules  
of Practice: Appeals: Standing to Appeal

Where, in an appeal from a termination of an easement crossing land conveyed to a Native corporation, the State alleges that it has a property interest in lands beneath a body of water because that body of water is navigable, the State's allegation will be deemed sufficient to establish standing to appeal under 43 C.F.R. § 4.410(b), absent a previous determination by BLM that such waterbody is, in fact, nonnavigable.

APPEARANCES: John T. Baker, Esq., Assistant Attorney General, State of Alaska, for appellant; Carlene Faithful, Esq., Office of the Regional Solicitor, Anchorage, Alaska, for the Bureau of Land Management.

#### OPINION BY ADMINISTRATIVE JUDGE BURSKI

By decision dated September 18, 1995, the Anchorage District Office, Bureau of Land Management (BLM), notified the Department of Natural Resources of the State of Alaska that various public easements which had been reserved pursuant to section 17(b) of the Alaska Native Claims Settlement Act (ANCSA), 43 U.S.C. § 1616(b) (1976), across lands which had been interimly conveyed to Afognak Native Corporation (ANC) were being terminated because it had been determined that they were no longer required. The State of Alaska thereafter appealed to this Board challenging the substance of the District Office determination. BLM responded by moving to have this appeal dismissed on the ground that the State lacked standing to challenge its determination. For the reasons set forth below, we grant BLM's motion in part and deny it in part.

The decision being challenged had determined that 21 easements which had been retained, pursuant to section 17(b), in three separate interim conveyances (IC Nos. 60, 103, and 217) were no longer required based on a review of the lands, Native historical values, photographs, and public use patterns. The decision briefly discussed each of the easements involved and explained the specific rationale for releasing each easement. While the decision, itself, was addressed to ANC and Koniag, Inc., the State of Alaska was provided with a copy. The State timely appealed and filed a request with the Board that it stay the effect of BLM's decision.

In its request for stay, the State emphasized "the significance of Big Kitoi Lake on Afognak Island as the focus of longstanding floatplane use for hunting and fishing and access to the Duck Mountain area," and claimed that the BLM decision failed to make adequate provision for maintaining floatplane access to Duck Mountain. See Petition for Stay at 2. By Order dated December 5, 1995, after noting that a review of the record indicated that the State's objections were limited to the elimination of easement EIN F 35 and site easement EIN D1 35c which were located on and around Big Kitoi Lake, we stayed the effect of BLM's decision only as it related to those two easements.

On January 16, 1996, the State filed a motion seeking reconsideration of the Board's Order of December 5, 1995, objecting to the fact that the stay had been limited to only two easements. The State complained that "the Board has never imposed a rigid requirement that a party appealing a BLM decision terminating easements under Sec. 17(b) of ANCSA address each easement with particularity when petitioning for a stay of the decision" and further asserted that "the standard practice for the State and other parties to such appeals has been to address each affected easement with particularity on the merits, when briefing the level of use, or availability of alternative access, relative to each easement." (Motion for Reconsideration at 3.) The State averred that nine easements (EIN F 35, EIN D1 35c, EIN D1 35d, EIN D1 35e, EIN D1 35f, EIN D9 11, EIN O 4, EIN D9 6, and EIN D9 13) "are all reasonably necessary to provide continued access to public resources, including public and navigable waterbodies." (Motion for Reconsideration at 3-4.)

By Order dated April 8, 1996, the Board, while advising the State that the Board expects any party seeking a stay of a decision with multiple components to specifically identify those aspects of the decision for which the stay is sought, nevertheless granted the motion to reconsider its previous order and extended the stay to cover all nine easements which the State had asserted were "reasonably necessary to provide continued access to public resources." See Order of April 8, 1996, at 2.

On May 20, 1996, the State filed its statement of reasons in support of its appeal (SOR). In this SOR, the State first addressed the question of its standing to appeal, as it was required to do by 43 C.F.R. § 4.412(b). The State asserted that it possessed the necessary affected property interest to allow it to challenge BLM's decision on the ground

that "[e]ach of the easements subject to this appeal provide[s] access to navigable waters and submerged lands title to which is asserted by the State." (SOR at 2.) The State argued that the fact that BLM might dispute the State's claim of ownership to the navigable waterbodies and submerged lands was irrelevant to the question of its standing, citing State of Alaska, 126 IBLA 204 (1993). Moreover, the State pointed out that in State of Alaska, 102 IBLA 357 (1988) ("Katalla River"), the Board had specifically held that BLM lacked authority to convey submerged lands underlying navigable rivers within the Chugach National Forest. The State noted that all of the easements involved herein provide access to navigable waterbodies within the original Chugach National Forest withdrawal. See SOR at 3-4.

The State commenced its substantive attack on BLM's decision by recounting general principles regarding navigable bodies of water as they have developed over the years. Thus, the State noted that, under numerous decisions of the United States Supreme Court, see, e.g., Utah Division of State Lands v. United States, 482 U.S. 193 (1987) ("Utah Lake"); Oregon ex rel. State Land Board v. Corvallis Sand & Gravel Co., 429 U.S. 363, 374 (1977), title to the beds of navigable waterbodies was deemed to vest in a State upon its admission to the Union as an incidence of sovereignty, absent the prior conveyance or reservation of such lands.

Such prior conveyance or reservation, however, was not lightly to be inferred. Thus, insofar as conveyance to a third party is concerned, the Supreme Court has been reluctant to find that the beds of navigable waters have been conveyed "unless the intention was definitely declared or otherwise made very plain, or was rendered in clear and especial words, or unless the claim confirmed in terms embraces the land under the waters of the stream." Montana v. United States, 450 U.S. 544, 552 (1981) (internal quotations omitted; citations omitted). With respect to reservations by the United States for its own use, the Court has held that it was not only necessary to show that Congress intended to include land under navigable waters in the reservation but that Congress affirmatively intended to defeat the future State's title to such lands. See Utah Lake at 202. Based on these principles and noting that "it is undisputed that BLM has never even attempted to perform administrative navigability determinations on waterbodies in this category," the State argued that BLM's designation of such navigable waterbodies as nonmajor was "arbitrary per se." (SOR at 9.)

Turning to the question of the need for the various easements at issue, the State claimed that not only was there substantial evidence of present existing use of the easements but that each of the easements was necessary to provide access to isolated tracts of publicly owned lands and would properly be retained regardless of whether or not existing use was occurring. See SOR at 12-16. On these bases, the State requested that the Board set aside BLM's decision and remand it with instructions to determine the need for the easements in question on the basis that they currently provide access to isolated tracts of publicly owned lands. Id. at 16-17.

On October 8, 1996, BLM filed a motion seeking dismissal of the State's appeal on the grounds that the State had failed to establish the property interest required by the regulations relating to appeals from decisions issued under ANCSA, as amended, 43 U.S.C. §§ 1601 to 1629 (1994), as a precondition for maintaining an appeal under 43 C.F.R. § 4.410(b). BLM argued that, while the State was attempting to premise its property interest on its asserted ownership of submerged lands beneath navigable waterbodies, it was precluded from doing so with respect to any of the inland waterbodies conveyed pursuant to IC Nos. 60, 103, and 217.

Thus, BLM noted that the Decisions to Issue Conveyance (DIC) for IC Nos. 60 and 217 had noted that "[t]here are no inland water bodies considered to be navigable within the lands described." See BLM Motion to Dismiss at 3. BLM pointed out that neither DIC was appealed and that both IC No. 60 and IC No. 217 subsequently issued without any exclusion for submerged lands beneath inland waterbodies. While admitting that the DIC with respect to IC No. 103 did not contain an express declaration that there were no navigable inland waterbodies within the lands therein described, BLM argued that the subsequent issuance of IC No. 103 without any exclusion for navigable waterbodies effectively conveyed submerged lands beneath any inland waterbodies.

BLM supported its conclusion that the State of Alaska had no standing, even with respect to IC No. 103, by referencing an April 9, 1986, memorandum, styled "Final Navigability Determination for Lands in Kodiak Survey Groups (Part 1) (Window 1570) and (Part 2) (Window 1693)." In this determination, the Deputy State Director for Conveyance Management declared:

There are no navigable waters in the Chugach National Forest on Afognak Island \* \* \*. Title to the beds of water bodies, if navigable, did not pass to the State of Alaska upon its entry into the Union. All lands underlying freshwater bodies within the exterior boundaries of these withdrawals are exempt from operation of the Submerged Lands Act. Lakes that fall within this category include: \* \* \* Kitoi.

BLM also relied on the provisions of section 901(b) of the Alaska National Interest Lands Conservation Act (ANILCA), 94 Stat. 2431, as amended, 43 U.S.C. § 1631(c) (1994). In relevant part, the statutory language now provides:

(1) The execution of an interim conveyance or patent, as appropriate, by the Bureau of Land Management which conveys an area of land selected by a Native or Native Corporation which includes, surrounds, or abuts a lake, river, or stream, or any portion thereof, shall be the final agency action with respect to a decision of the Secretary of the Interior that such lake, river, or stream, is or is not navigable, unless such decision was validly appealed to an agency or board of the Department of the Interior on or before December 2, 1980.

(2) No agency or board of the Department of the Interior other than the Bureau of Land Management shall have authority to determine the navigability of a lake, river, or stream within an area selected by a Native or Native Corporation pursuant to the Alaska Native Claims Settlement Act or this Act unless a determination by the Bureau of Land Management that such lake, river, or stream, is or is not navigable, was validly appealed to such agency or board on or before December 2, 1980.

43 U.S.C. § 1631(c)(1) and (2) (1994).

BLM pointed out that the State clearly did not challenge any determination as to the navigability of waterbodies within the three IC's involved herein prior to December 2, 1980, and argued, therefore, that this Board was without jurisdiction to examine BLM's assertion that all of the waterbodies involved were nonnavigable. Based on all of the foregoing arguments, BLM requested that the Board dismiss the instant appeal because the State had failed to show the requisite property interest required by the regulations to establish standing.

The State responded with a memorandum in opposition to the motion to dismiss. The State contended that it clearly had standing to appeal based on its allegation that the easements were needed to secure access to State lands underlying navigable waterbodies and cited State of Alaska, 132 IBLA 197 (1995), and State of Alaska, 78 IBLA 390 (1984), as supporting this proposition. Further, it argued that BLM's reliance on the April 9, 1986, memorandum by the Deputy State Director for the proposition that the State acquired no title to navigable waterbodies within the Chugach National Forest is foreclosed by this Board's decision in the Katalla River case which expressly rejected that conclusion. Finally, the State disputed BLM's assertion that 43 U.S.C. § 1631(c)(1) (1994) effectively estopped the State from challenging navigability determinations. It argued that the actual language of the statute makes it clear that "Congress was addressing the ability of a Native corporation to challenge the acreage conveyed it as a result of a BLM decision regarding the navigability of water bodies within a given Interim Conveyance," and that this was the interpretation which the Department of Justice had embraced in litigation in Federal District Court. 1/ See Opposition to Motion to Dismiss at 4-5.

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1/ Thus, the State notes that in Alaska v. United States, No. A93-437-CV (JKS), the United States filed a motion to dismiss in which it declared that:

"We do not wish to suggest that [past BLM navigability determinations] are binding on the Department of the Interior or even that they necessarily represent the conclusion that the Department would reach if it reviewed those decisions today. Indeed, BLM navigability determinations are merely part of the process of surveying and accounting for acreage conveyed."  
(United States Motion to Dismiss at 3-4.)

The State concluded by noting that:

The State is not "challenging title" to these lands, since the Department lacks the authority to determine title to submerged lands. Rather, the State is merely asserting a property interest which cannot be dispositively denied in this forum, for purposes of raising standing to appeal a decision affecting public access. BLM would apparently have the State litigate title to submerged lands before being allowed to contest a decision denying access under Section 17(b), where it is the BLM decision which threatens the State's interest in those lands in the first instance. BLM has not denied that the water bodies in question are navigable in fact. The State has clearly raised a colorable claim of title to property which would be affected by the BLM decision. No more is required to demonstrate standing to bring this appeal.

(Opposition to Motion to Dismiss at 6.)

[1] Before embarking on an examination of the rather complicated legislative parameters which will ultimately determine the question of standing, it is useful to set forth a number of generalized principles regarding determinations of navigability which are not in dispute. It has long been recognized that, prior to the admission of a State into the Union, the United States held title to the lands beneath navigable waterbodies in trust for the future State as an incidence of sovereignty. See Utah Lake, *supra* at 195-96; Shivley v. Bowlby, 152 U.S. 1, 49 (1894); Pollard's Lessee v. Hagan, 44 U.S. (3 How.) 212 (1845). Title to such lands had vested in the 13 Colonies upon independence from Great Britain and was retained by them upon their entry into the Union. Under the "equal footing" doctrine, when other States were later admitted to the Union, they were deemed to hold title to the lands beneath navigable waters as of their date of entry.

Notwithstanding the foregoing, it was also recognized that, prior to the admission of a State, Congress was vested with the power to dispose of lands beneath navigable waters for an appropriate public purpose. See, e.g., Choctaw Nation v. Oklahoma, 397 U.S. 620 (1970); United States v. Holt State Bank, 270 U.S. 49, 56 (1926); Shivley v. Bowlby, *supra*. However, as the Supreme Court emphasized both in Utah Lake, *supra* at 197-98, and Montana v. United States, 450 U.S. 544, 554 (1981), there is a strong presumption against pre-Statehood disposals of lands beneath navigable waters.

Of more particular moment herein, the Court in the Utah Lake decision noted that, where the question presented is whether the United States reserved the bed of a navigable waterbody for its own purposes, there

must be two discrete showings. 2/ First, there must be a showing that Congress clearly intended to reserve the lands beneath a navigable waterbody. In addition, however, the Court held that there must be a showing that Congress intended thereby to defeat the future State's claim to the land. Utah Lake, *supra* at 201-202. 3/ Absent a showing of both an intent to reserve the lands and an intent to defeat any future claim by a State thereto, the Court held that the presumption against pre-Statehood disposals could not be overcome.

Insofar as the determination as to whether a waterbody is or is not navigable, it has long been recognized that what is navigable in fact is necessarily navigable in law. See, e.g., United States v. Holt State Bank, *supra*. Bodies of water are navigable in fact "when they are used, or are susceptible of being used, in their ordinary condition, as highways for commerce, over which trade and travel are or may be conducted in the customary modes of trade and travel on water." The Daniel Ball, 77 U.S. (19 Wall.) 557, 563 (1870). In determining whether a waterbody was "susceptible of being used" as a highway for commerce, 4/ the Supreme Court has noted that navigability is a flexible concept and that each application of the broad standard described in The Daniel Ball "is apt to uncover variations and refinements which require further elaboration." United States v. Appalachian Electric Power Co., 311 U.S. 377, 406 (1940); see also Alaska v. Ahtna, Inc., 891 F.2d 1401, 1405 (9th Cir. 1989); Alaska v. United States, 754 F.2d 851, 854 (9th Cir. 1985).

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2/ It is important to note that whether or not the United States had the authority to reserve the land for a public use as opposed to merely the authority to convey it to a third party was a question expressly not decided by the majority in the Utah Lake decision. See Utah Lake, *supra* at 201. Rather, what the majority held was that, assuming such authority existed, it had not been exercised by Congress with respect to Utah Lake. The four dissenting Justices, however, expressly affirmed both their belief that Congress was possessed of authority to reserve for itself beds beneath navigable waters within Territories and that Congress had done so with respect to Utah Lake. See Utah Lake, *supra* at 209-10 (White, J., dissenting).

3/ The Court justified this heightened level of inquiry by noting that "[w]hen Congress intends to convey land under navigable waters to a private party, of necessity it must also intend to defeat the future State's claim to the land. When Congress reserves the land for a particular public purpose, however, it may not also intend to defeat a future State's title to the land." Id. at 202.

4/ In Alaska v. United States, 662 F. Supp. 455 (D. Alaska 1987), *aff'd sub nom.* Alaska v. Ahtna, 891 F.2d 1401, 1405 (9th Cir. 1989), the District Court noted that a determination that a waterbody was susceptible to use as a transportation route would almost always subsume a finding that the waterbody was susceptible to use as a highway for commerce. Id. at 464. The Court declined, however, to go so far as to hold that a showing of susceptibility to use as a highway for commerce is no longer required. Id.



Because the question of navigability is essentially a question of fact, findings by the Department of the Interior are, in the context of Federal court determinations as to navigability, treated as purely advisory. However, notwithstanding the limitations inherent in a Departmental declaration that a body of water is or is not navigable, it is often necessary for the Department to make such an initial determination of navigability as an aid to carrying out many of its statutory functions. Such was deemed to be the case with respect to initial adjudications under ANCSA relating to land conveyances to Native regional and village corporations since the navigability or nonnavigability of waterbodies was deemed to affect the determination of what was "public land" under section 3(e) of ANCSA and, thus, acreage computations under sections 12 and 14 of that Act. <sup>5/</sup> See 43 U.S.C. §§ 1602(e), 1611, and 1613 (1994). As a result, the Department made a number of determinations as to the navigability of waterbodies in Alaska which in turn led to a spate of Federal and administrative appeals. See, e.g., Alaska v. United States, 662 F. Supp. 455 (D. Alaska 1987), aff'd sub nom. Alaska v. Ahna, supra; Doyon, Ltd., 6 ANCAB 242 (1981); Doyon, Ltd. and State of Alaska, 5 ANCAB 324, 88 I.D. 636 (1981); Appeal of Bristol Bay Native Corp., 4 ANCAB 355, 87 I.D. 341 (1980); Appeal of Doyon, Ltd., 4 ANCAB 50, 86 I.D. 692 (1979). Not only did direct challenges to navigability determinations affect the timeliness of land conveyances but they also inhibited the determination of a number of other appeals where such determinations were merely ancillary to the issues being presented. See, e.g., Patricia and William Nordmark, 6 ANCAB 157 (1981).

Concerned about the delays in the ultimate resolution of Native land claims in Alaska as well as State selections under section 6 of the Alaska Statehood Act, Act of July 7, 1958, 72 Stat. 339, 340-43, that might be caused by litigation (both administrative and judicial) over navigability questions, Congress sought, beginning with the passage of ANILCA in 1980,

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<sup>5/</sup> With one limited exception relating to nonnavigable bodies of water covering a half section of land or more, at the time that ANILCA was adopted the Departmental policy in computing acreage conveyed to Native corporations under ANCSA and to the State under the Statehood Act, supra, was to treat all submerged lands beneath nonnavigable waterbodies within a surveyed area as chargeable against entitlement. Lands beneath waterbodies deemed to be navigable were not charged against the Native corporation's entitlement. See 43 C.F.R. § 2650.5-1(b) (1982). In December 1983, however, the Department changed this policy to conform with the general rules applicable to cadastral surveys conducted in the lower 48 States which resulted in the exclusion from chargeability of the beds of all meandered waterbodies, not merely those which were deemed navigable. See 48 Fed. Reg. 54483 (Dec. 5, 1983). This change greatly reduced the necessity for BLM to determine whether or not any specific body of water was navigable (see generally Chugach Alaska Corp., 101 IBLA 375 (1988)) and was ultimately expressly ratified by Congress in the Act of Aug. 16, 1988, 102 Stat. 979. See discussion in the text, infra.

to limit the impact of navigability adjudications. See § 901 of ANILCA, 94 Stat. 3430-33, 43 U.S.C. § 1631 (1982). <sup>6/</sup> Thus, in section 901(a) Congress limited the time in which a civil suit could be brought in Federal court to challenge either the conveyance of submerged lands or a determination by the Secretary of the Interior that water covering a parcel of land was nonnavigable. 43 U.S.C. § 1631(a) (1982). This subsection expressly provided that "[t]he civil action described in this subsection shall be a de novo determination of the ownership of the parcel which is the subject of the action." Id.

[2] Of more immediate relevance to the instant appeal, section 901(b) expressly limited the right of adversely affected parties to administratively challenge BLM navigability determinations. See 43 U.S.C. § 1631(b) (1982). As adopted in 1980, the codified language provided:

No agency or board of the Department of the Interior other than the Bureau of Land Management shall have authority to determine the navigability of water covering a parcel of submerged land selected by a Native Corporation or Native Group pursuant to the Alaska Native Claims Settlement Act unless a determination by the Bureau of Land Management that the water covering a parcel of submerged land is not navigable was validly appealed to such agency or board prior to the date of enactment of this Act. The execution of an interim conveyance or patent (whichever is executed first) by the Bureau of Land Management conveying a parcel of submerged land to a Native Corporation or Native Group shall be the final agency action with respect to a decision by the Secretary of the

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<sup>6/</sup> There is, unfortunately, no direct evidence of Congress' intent in enacting section 901 of ANILCA. The language, as adopted, had not been part of the bill as approved by the Senate Committee on Interior and Insular Affairs. Compare § 901 as reported in S. Rep. No. 96-413, 96th Cong., 1st Sess., at 40-41 with § 901 of ANILCA, 43 U.S.C. § 1631 (1982). The language ultimately adopted as section 901 was added as part of a substitute bill proposed by Senator Tsongas of Massachusetts and adopted on the Senate floor. See 126 Cong. Rec. 21596 (Aug. 18, 1980). The sole explanation of the import of this provision was the statement that the Tsongas amendment would "add a submerged land statute of limitations provision which has been worked out by the various parties involved." 126 Cong. Rec. 21651 (Aug. 18, 1980). That Congress was concerned with conveyance delays engendered by the navigability determinations is, however, clearly seen in the legislative history surrounding the adoption of the Act of Nov. 10, 1986, 100 Stat. 3581, and the Act of Aug. 16, 1988, 102 Stat. 979. See, e.g., S. Rep. No. 99-507, 99th Cong. 2d Sess., reprinted in 1986 U.S.C.C.A.N. 6100-112; S. Rep. No. 100-302, 100th Cong. 2d Sess., reprinted in 1988 U.S.C.C.A.N. 1356-71.

Interior that the water covering such parcel is not navigable, unless such decision was validly appealed prior to the date of enactment of this Act to an agency or board of the Department of the Interior other than the Bureau of Land Management.

43 U.S.C. § 1631(b) (1982).

In 1986, Congress twice amended the provisions of section 901 of ANILCA to extend the time periods for commencing suit on navigability determinations as established in section 901(a). See Act of March 3, 1986, 100 Stat. 42; Act of November 10, 1986, 100 Stat. 3581. These Acts were preliminary to the major revision effected by the Act of August 16, 1988, 102 Stat. 979.

In brief, the Act of August 16, 1988, supra, repealed the time limitations for commencing any civil suit challenging nonnavigability determinations which had been imposed on the State of Alaska by section 901(a) of ANILCA. In its place, Congress adopted a new section 901(a) which essentially enacted the December 1983 Departmental policy change regarding the chargeability of acreage for meandered waterbodies. See note 5, supra. In addition, Congress expressly provided that "[t]he Secretary is not required to determine the navigability of a lake, river, or stream which because of its size or width is required to be meandered or to compute the acreage of the land beneath such lake, river, or stream or to describe such land in any conveyance document." See 43 U.S.C. § 1631(a)(3) (1994).

Congress also adopted a new section 901(b). The new section 901(b)(1) provided that the conveyance of any lands abutting or surrounding a meanderable body of water would convey "all right, title, and interest of the United States, if any" in the lands beneath the meanderable waterbody, but that such acreage would not be charged against entitlement. 43 U.S.C. § 1631(b)(1) (1994). In section 901(b)(2), Congress expressly ratified an agreement between the State of Alaska and the Interior Department, dated March 28, 1984. See 43 U.S.C. § 1631(b)(2) (1994). Congress also repromulgated, with certain editorial changes, the original provisions of section 901(b) as subsections (1) and (2) of section 901(c). See 43 U.S.C. § 1631(c)(1) and (2) (1994).

Since under the 1988 amendments the acreage beneath any waterbody which was meandered was not counted against entitlement irrespective of whether or not it was deemed navigable, the primary effect of these statutory changes was to remove the impediment to conveyances under ANCSA and ANILCA which had resulted from the fact that prior to this amendment, in order to determine acreage chargeability of land abutting waterbodies, BLM had to make navigability determinations in virtually every conveyance. Because of the 1988 amendments, there was no need in the overwhelming number of cases for BLM to make any determination of navigability whatsoever. See, e.g., State of Alaska (Ayakulik), 145 IBLA 122 (1998). However, it is equally important for our present purposes to recognize that,

insofar as prior IC's or patents were concerned, 7/ the law remained that the execution of either of those documents constituted "the final agency action with respect to a decision of the Secretary of the Interior that such lake, river, or stream, is or is not navigable." 43 U.S.C. § 1631(c)(1) (1994).

[3] In its motion to dismiss, BLM argues that the State lacks the property interest necessary to maintain an appeal under 43 C.F.R. § 4.410(b) because it is foreclosed by 43 U.S.C. § 1631(c)(1) (1994) from asserting ownership of the land beneath the various waterbodies involved, at least before the Board. Insofar as IC Nos. 60 and 217 are concerned, we must agree. With respect to both of these IC's, BLM issued DIC's which clearly stated that there were no inland waterbodies considered to be navigable. 8/ See Decision of May 5, 1977, at 10 (IC No. 60); Decision of December 7, 1977, at 22 (IC No. 217). Since Congress has decreed that such determinations are final agency action and not subject to review by this Board (there having been no appeal prior to December 2, 1980), this Board simply has no authority to contravene them, even for the limited purpose of allowing the State to predicate standing thereon.

The State contends that it has shown the requisite property interest necessary to establish standing based on two prior Board determinations, viz., State of Alaska, 132 IBLA 197 (1995), and State of Alaska, 78 IBLA 390 (1984). Neither case, however, is apposite the instant fact situation.

In State of Alaska, 78 IBLA 390 (1984), the State challenged the failure of BLM to reserve any public easements along 28.5 miles of the Yukon River in approving a conveyance to a Native village corporation. The Yukon River had been determined to be navigable throughout its course through the land conveyed and had been expressly excluded from the conveyance by BLM. Id. at 391 n.2. Before the Board, BLM challenged the State's standing to maintain the appeal, arguing that, inasmuch as the bed of the Yukon River had been expressly excluded from the conveyance, the State lacked the requisite property interest. In rejecting the challenge to the State's standing, the Board, relying on prior ANCAB decisions such as Patrick J. Bliss, 6 ANCAB 181, 88 I.D. 1039 (1981), and Joseph C. Manga, 5 ANCAB 224, 88 I.D. 460 (1981), held that the State established a property

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7/ This would also, of course, be true in those limited number of cases after 1988 in which BLM expressly made a navigability determination.

8/ Admittedly, the DIC for IC No. 60 actually stated that "[t]here are no inland water bodies known to be navigable by reason of travel, trade, and commerce within the areas described above." While this may not be as definite as the declaration in the DIC for IC No. 217 that "[t]here are no inland water bodies considered to be navigable within the lands described," we believe the DIC for IC No. 60 is sufficiently declarative as to constitute an affirmative declaration by BLM that none of the inland waterbodies covered therein was navigable.

interest in land affected by the decision being appealed based on its ownership of the bed of the Yukon River, together with its assertion that the failure of BLM to reserve various easements adversely affected the State's ability to provide "a reasonable pattern of public travel and access along the river." Id. at 393.

Similarly, in State of Alaska, 132 IBLA 197 (1995), the State appealed from the failure to reserve a site easement on the north shore of Lower Ugashik Lake in the conveyance of an historical site to a Native regional corporation pursuant to section 14(h)(1) of ANCSA, as amended, 43 U.S.C. § 1613(h)(1) (1994). In rejecting a motion by BLM to dismiss this appeal for lack of standing, the Board noted that "[i]t is to the navigable waters of the narrows and State-owned land in the narrows below the ordinary high water mark \* \* \* that the State seeks access for the public to fish." Id. at 203.

There is, of course, an obvious and critical point of difference between the factual construct in both State of Alaska, 78 IBLA 390 (1984) and State of Alaska, 132 IBLA 197 (1995), and that presented by the instant case. In both of these prior decisions, there was no question that the waterbodies involved were navigable and, therefore, the State's property interest in the beds of those waterbodies was uncontested. With respect to IC Nos. 60 and 217, the exact opposite is the case. BLM has, in fact, determined that none of the inland waterbodies are navigable and this determination is not subject to challenge before the Board. Since the State, absent ownership of the adjacent uplands, does not own the beds of nonnavigable waterbodies, this factual determination by BLM precludes us from basing standing on the property interest deemed sufficient in State of Alaska, 78 IBLA 390 (1984) and State of Alaska, 132 IBLA 197 (1995).

[4] We recognize that in a more recent decision, State of Alaska (Koniag, Inc.), 137 IBLA 81, 82 (1996), it was "assumed" for the purposes of that decision that the State had a sufficient property interest with respect to land beneath waterbodies which the State asserted were navigable to maintain its appeal. In that case, however, while both BLM and the Native regional corporation argued that it had not been proven that Larson Bay and the Karluk River were navigable at the points in issue, there was no finding by BLM that these waterbodies were nonnavigable. While not cited therein, this approach is consistent with the decision of the Board in Katmailand, Inc., 77 IBLA 347 (1983), where the Board held that the failure of BLM to make a navigability determination did not, ipso facto, render the Brooks River nonnavigable. In that case, for purposes of determining whether an allotment applicant exceeded the 160-rod shore space limitation, the Board held that "[a]bsent a specific determination of nonnavigability, BLM's only recourse is to assume navigability," noting that any other course might result in a violation of the shore space limitation. 77 IBLA at 359.

We are of the view that, where the State challenges a decision of BLM to relinquish an easement which crosses lands conveyed to a Native corporation, the State will not be precluded from asserting that the waterbody is navigable for the sole and limited purpose of establishing standing to appeal the decision, in the absence of a specific finding by BLM that the waterbody is, in fact, nonnavigable. While this approach has no relevancy with respect to IC Nos. 60 and 217 since BLM has affirmatively found that the waterbodies are nonnavigable, it may be applicable to IC No. 103, inasmuch as BLM concedes that there was no affirmative statement in either the DIC or IC finding the waterbodies located therein to be nonnavigable. See Decision of February 20, 1976 (IC No. 103).

Notwithstanding the failure of either the DIC or IC to affirmatively proclaim that the inland waterbodies included therein were nonnavigable, BLM argues that, since IC No. 103 did not exclude any inland waterbodies, the beds of such waterbodies were, necessarily, included within the conveyance. BLM argues that this conclusion is "confirmed" by the April 9, 1986, memorandum by the Deputy State Director for Conveyance Management, as well as by section 901(b) of ANILCA. We do not agree.

First of all, the mere fact that the beds of various waterbodies were not expressly excluded from the conveyance does not, in and of itself, rise to the level of a navigability determination. Indeed, in some cases BLM affirmatively ruled that a waterbody was navigable yet, nevertheless, failed to exclude the bed of that waterbody from a conveyance to a Native regional corporation. Thus, in Cook Inlet Region, Inc. (On Reconsideration), 100 IBLA 50, 94 I.D. 422 (1987), we expressly held that, notwithstanding BLM's failure to exclude the bed of the Susitna River (id. at 53 n.3, 94 I.D. at 424 n.3), "BLM's September 30, 1983, decision is properly interpreted as excluding lands beneath the navigable portions of the Susitna River from conveyance." Id. at 58, 94 I.D. at 426.

Second, to the extent that BLM attempts to bolster its argument by reference to the April 9, 1986, memorandum by the Deputy State Director for Conveyance Management, its reliance is misplaced. As the State correctly points out, the contention that the Presidential proclamations establishing both the Afognak Forest and Fish Culture Preserve and the Chugach National Forest effected a withdrawal sufficient to defeat State title to the beds of navigable waterbodies was definitively rejected in our Katalla River decision. See 102 IBLA 357. In that case, BLM had argued that the bed of the Katalla River, which was admitted to be navigable at the points in controversy, had not passed to the State of Alaska upon its entry into the Union based on the 1907 proclamation. The Board, applying the Supreme Court's Utah Lake analysis, expressly rejected this assertion, holding that the facts failed to show "that Congress clearly intended to include land under navigable waters within the Chugach National Forest reservation or that Congress affirmatively intended to defeat the future State's title to that land." Katalla River, 102 IBLA at 361. Accordingly, the Board held

that "the submerged lands beneath the Katalla River had passed to the State of Alaska pursuant to the Statehood Act and were therefore unavailable for conveyance by BLM." Id. 9/ The Board's decision in the Katalla River appeal constitutes the Department's position on the effect of the Chugach National Forest proclamation. See, e.g., Milton D. Feinberg (On Reconsideration), 40 IBLA 222, 86 I.D. 234 (1979).

Finally, nothing in 43 U.S.C. § 1631(c)(1) (1994) compels the conclusion that issuance of IC No. 103 constituted a declaration of nonnavigability with respect to all inland waterbodies. The statute merely provides that issuance of an IC will be "the final agency action with respect to a decision of the Secretary of the Interior that such lake, river, or stream, is or is not navigable." Absent an actual decision as to whether or not any waterbody is or is not navigable within the confines of the IC process, there is no finding to which this provision can attach. Thus, while this provision precludes any review of whether or not waterbodies included within IC Nos. 60 and 217 were navigable since the DIC's clearly asserted that they were not, it has no effect with respect to IC No. 103 where no such determination was made.

We conclude, therefore, consistent with our analysis above, that the State may predicate standing to challenge the termination of easements within IC No. 103 based on its assertion that they are needed to provide access to State-owned land beneath navigable waterbodies. However, since, for the reasons set forth above, the State is precluded from making a similar argument with respect to IC Nos. 60 and 217, the State's challenge to BLM's termination of easements EIN D9 11, EIN O 4, EIN D9 6, and EIN D9 13 must be dismissed. Insofar as EIN F 35 is concerned, the viability of the State's challenge to the termination of this easement is open to question inasmuch as parts of this easement were included both in IC No. 60 and IC No. 103. The parties may wish to address this question in any subsequent pleadings.

We note that BLM has not yet addressed the State's substantive arguments as to why the remaining easements should not be terminated. BLM is hereby afforded 60 days from receipt of this decision in which to submit its response thereto.

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9/ Subsequent to the issuance of the Board's Katalla River decision, the Secretary of the Interior, by memorandum dated Dec. 20, 1988, stayed the effect of this decision pending further analysis. On Apr. 20, 1992, the Solicitor issued an opinion entitled "Ownership of Submerged Lands in Northern Alaska in Light of Utah Division of State Lands v. United States," 100 I.D. 103. Thereafter, by Order dated Jan. 6, 1994, the Board reaffirmed its conclusion that the Presidential proclamation did not effect a reservation sufficient to defeat Alaska's title from vesting upon the State's admission to the Union. See 102 IBLA 362A.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 C.F.R. § 4.1, the motion to dismiss is granted in part and denied in part, as delineated above.

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James L. Burski  
Administrative Judge

I concur:

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Will A. Irwin  
Administrative Judge